

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

M.C. DEAN, INC.

Employer

and

Case 05-RC-267942

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 99, a/w INTERNATIONAL
UNION OF OPERATING ENGINEERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

M.C. Dean, Inc. (“Employer”) is engaged in the business of providing facilities and maintenance services to government entities, including at the White House Complex in Washington DC. International Union of Operating Engineers, Local 99, a/w International Union of Operating Engineers, AFL-CIO (“Petitioner”) filed the petition herein with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”) seeking to represent a bargaining unit of all full-time and regular part-time general maintenance technicians, fire alarm technicians, building automation systems technicians, plumbers, carpenters, HVAC technicians, electrical maintenance technicians, and locksmiths employed by the Employer at the White House Complex currently located at 1600 Pennsylvania Avenue, NW, Washington, DC, but excluding all other employees, office clerical employees, shift leads, managerial employees, confidential employees, guards, and supervisors as defined in the Act. The parties stipulated, and I find, that the agreed upon unit (“Unit”) set forth above is appropriate for the purposes of collective bargaining. A hearing was held November 17, 2020¹ before a hearing officer of the Board.²

¹ All dates herein are in 2020, unless specified otherwise.

² Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated the undersigned its authority in this proceeding. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a corporation with a principal place of business in Tysons, Virginia, and is engaged in the business of providing facilities and maintenance services to government entities, including at the White House Complex currently located at 1600 Pennsylvania Avenue, NW, Washington, DC, 20500. In conducting its operations during the 12-month period ending October 31, 2020, the Employer provided services valued in excess of \$50,000 in states other than the Commonwealth of Virginia. During that same period of time, the Employer has conducted its business operations described above in Washington DC, and the Board asserts plenary jurisdiction over enterprises in Washington, DC.
3. I further find, as also stipulated by the parties, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

The only matter in contention here is whether to conduct the election manually or by mail ballot. The Employer argues that a manual election in this case can be safely conducted notwithstanding the Covid-19 pandemic. Petitioner, however, contends that a mail ballot election is required. The parties were advised that the determination over the method of election would not be litigated. The determination over the method of election rests within the discretion of the Regional Director, and therefore, it was not an issue subject to litigation during the hearing. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (“Casehandling Manual”). Notwithstanding, the parties were afforded an opportunity to present evidence regarding the feasibility of conducting a manual election considering the continuing spread of coronavirus and Covid-19, as well as stating for the record the parties’ positions with respect to this matter. The parties were also afforded the opportunity to file a post-hearing brief, however, only the Employer took advantage of the opportunity.

I have reviewed the evidence, the arguments presented by the parties, currently available Covid-19-related data for the Washington DC metropolitan area, as well as the applicable legal precedent. As will be discussed in detail below, I find that conducting a mail ballot election is required under the present circumstances.

I. FACTUAL OVERVIEW

A. The Employer’s operation and the ongoing pandemic.

As part of providing facilities and maintenance services at the White House Complex, the Employer communicates with the General Services Administration (“GSA”), a federal government agency. Employees within the petitioned-for bargaining unit, as part of their daily duties working at the White House Complex, have occasion to interact with individuals beyond simply employees of the Employer. Relevant to the ongoing pandemic, if any Employer employee at the White House Complex is identified as a close contact with someone who has tested positive for Covid-19 or someone who has been exposed to Covid-19, GSA will notify the Employer.

B. Covid-19 Data in the Washington DC Metro Area.

As of December 7, Washington DC has reported 23,136 total Covid-19 cases since the beginning of the pandemic, with 697 of those cases resulting in death.³ On December 6 alone, Washington DC reported 263 new confirmed Covid-19 cases.⁴ Below is a chart that summarizes the testing positivity rate as well as whether confirmed cases are increasing or decreasing within the last 14 days for Washington DC and localities that surround the District of Columbia.

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4. The parties additionally stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
 5. Petitioner is seeking to represent the employees in the unit described in the petition and herein, but the Employer declines to recognize Petitioner as the collective-bargaining representative of those employees.
 6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ https://covid.cdc.gov/covid-data-tracker/#trends_totalandratecases

⁴ <https://www.nytimes.com/interactive/2020/us/washington-dc-coronavirus-cases.html>

Location	Positivity Rate as of the Hearing Date⁵	Most Recent Reported Positivity Rate⁶	14-Day Trend in the Number of New Cases
Washington, DC	3.1 %	3.8%	Increased within the last 14 days
State of Maryland	6.85 %	7.89% ⁷	Increased within the last 14 days
Montgomery County, Maryland	5 %	6.48% ⁸	Increased within the last 14 days
Prince George's County, Maryland	6.4 %	9.87% ⁹	Increased within the last 14 days
State of Virginia	7.4 %	10.8%	Increased within the last 14 days
Arlington County, Virginia	6.8 %	8.47% ¹⁰	Increased within the last 14 days
City of Alexandria, Virginia	5 %	8.17%	Fluctuating within the last 14 days
Fairfax County, Virginia	7.8 %	11.53%	Increased within the last 14 days
Loudoun County, Virginia	8.3 %	11.84%	Fluctuating within the last 14 days
Prince William County, Virginia	9.9 %	15.42%	Fluctuating within the last 14 days

II. POSITIONS OF THE PARTIES

The Employer argues that a manual election can be held safely at its proposed location. To begin with, the Employer proposes conducting the election at the Eisenhower Executive Office Building at 1650 Pennsylvania Avenue, NW, Washington, DC, a government building within the White House Complex. The record reflects that the Employer has received verbal confirmation from the contracting officer with GSA that a manual election in this case could be held at the Eisenhower Executive Office Building. However, the record also reflects that written confirmation for a manual election must come from the GSA legal department, and the record does not contain any evidence that written confirmation has been secured.¹¹

⁵ The testing positivity rates in this column reflect the data and figures entered into the record at the hearing.

⁶ I take administrative notice of current Covid-19-related data as required by the Board. In this chart, where a data point is not accompanied by an individual citation, that figure was taken from the following source: <https://coronavirus.jhu.edu/testing/tracker/overview>.

⁷ <https://coronavirus.maryland.gov/>

⁸ *Id.*

⁹ *Id.*

¹⁰ The testing positivity rates for Arlington and the Virginia counties that follow is sourced from: <https://www.vdh.virginia.gov/coronavirus/coronavirus/covid-19-in-virginia-testing/>

¹¹ Following the close of the hearing, the Region conducted further administrative investigation into the proposed manual election site. As of the date of this decision, that additional investigation showed the situation was unchanged with access to the proposed site remaining unconfirmed.

As for the mechanics of the election, the Employer proposes a maximum of two representatives from each party attend the pre-election conference and ballot count, with each party using one observer during the election. The proposed voting periods—three (3) 30-minute voting windows spread across two days—will, according to the Employer, sufficiently allow the relatively small Unit to vote while adhering to all social distancing guidelines. Further, the conference room where the election will take place has separate ingress and egress, and the Employer maintains that there is sufficient space within the proposed room to allow all election participants to properly socially distance themselves. The Employer will also ensure that there are distance markers to depict safe foot traffic in the area. Finally, the Employer asserts that the election can be held at its proposed location in a manner that complies with General Counsel Memorandum 20-10 (“GC 20-10”), and it will provide all of the requisite certifications required in GC 20-10 in advance of the election, including whether GSA has notified the Employer if any of its employees are considered a close contact of anyone who has tested positive for Covid-19.

Contrary to the Employer, the Petitioner urges me to direct a mail ballot election in this case.

III. APPLICABLE BOARD LAW

Recently, the Board implemented guidelines to be used in evaluating the propriety of a mail ballot election during this pandemic. On November 9, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it “set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the back-drop of Covid-19.” *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4. Moving forward, the Board has identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

- (1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...
- (2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...
- (3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...
- (4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...
- (5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status...
- (6) [o]ther similarly compelling considerations.

Aspirus Keweenaw, 370 NLRB No. 45 slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” *Id.* at 6, fn. 25. If “some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas.” *Id.* at 6.

III. ANALYSIS

A. Increasing local Covid-19 transmission requires a mail ballot election.

One metric cited by the Board that suggests the propriety of using mail ballots to conduct an election during this pandemic is an increase in the 14-day trend in the number of new confirmed cases. The 14-day trend for the number of confirmed cases in Washington, DC—where the proposed manual election will be held and where the petitioned-for employees work—is increasing. For that reason alone, a mail ballot election is warranted. However, as the Employer acknowledges in its post-hearing brief, its employees come from various locations to work in Washington DC, thus Covid-19 data from the surrounding localities is important, as noted by the Board in *Aspirus Keweenaw*. As the chart above shows, since this hearing was held, every county surrounding Washington DC has maintained a positivity rate higher than 5 percent—another metric cited by the Board that suggests the appropriateness of a mail ballot election. In sum, the District of Columbia shows an increasing 14-day trend in the number of new cases, and the suburban counties surrounding Washington DC have positivity rates higher than 5 percent. I am mindful of this factor not only for the Employer's employees, but also the volume of other individuals in the White House Complex that live in Washington, DC and its surrounding counties in Maryland and Virginia.

Whether analyzing the 14-day increasing trend in confirmed cases within Washington DC, or the continuously high positivity rate in the surrounding counties, I find that a mail ballot election is warranted in this case, the details of which are discussed below.

B. A mail ballot election is also appropriate because the record does not contain evidence that written permission to hold the manual election at the Employer's proposed location has been secured.

The Employer represented at the hearing that it had secured verbal assurances from GSA's contracting officer that a manual election in this case could be held at the Eisenhower Executive Office Building. However, the record does not contain any evidence that written permission has been secured. While not controlling, Casehandling Manual Section 11302.2 dictates that written permission should be secured when an election is proposed to be conducted on non-employer property. Additionally, if written permission cannot be secured in a timely manner, Section 11302.2 directs Regions to consider, *inter alia*, holding an election by mail ballot.

The record is devoid of any evidence that written permission to hold a manual election at the Eisenhower Executive Office Building has been secured. Indeed, the Employer, on the record, represented that written permission must come from the GSA legal department, not just the contracting officer, suggesting that written permission is more than just a formality. Moreover, while the Casehandling Manual is not controlling authority, I find it particularly prudent in the current environment to have written permission from the entity controlling the proposed election location prior to directing a manual election. This is even more the case in the current environment, where we have seen Covid-19 outbreaks occurring the government-imposed measures put in place in response. Directing a manual election without any evidence in

the record that the GSA legal department has granted, in writing, permission to hold the same on its property could subject the election to cancellation without any warning or recourse, resulting in an unnecessarily delayed election. Moreover, as noted above, the Region conducted further administrative investigation into the proposed manual election site. As of the date of this decision, that additional investigation showed the situation was unchanged with access to the proposed site remaining unconfirmed.

While I primarily direct this mail ballot election because of the ongoing Covid-19 concerns in the Washington DC metro area, I also find that a mail ballot election is warranted in this case because the record does not contain any evidence that GSA has authorized, in writing, the election to be held at the proposed Eisenhower Executive Office Building location.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 99, a/w International Union of Operating Engineers, AFL-CIO.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. Accordingly, on Tuesday, December 22, 2020 at 3:00 p.m., ballots will be mailed to voters by National Labor Relations Board, Region 05, from its office at 100 S. Charles Street, Bank of America Center, Tower II, Ste. 600, Baltimore, MD 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, December 29, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 05 Office at (410) 962-2822 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Baltimore Regional Office on Tuesday, January 19, 2021.¹² In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

¹² I take administrative notice that, in this time of year, the increased volume of mail received, processed, and delivered by the United States Postal Service will, in some instances, result in delays in delivery. I am accommodating this possibility by the selection of the date for the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending December 6, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **December 11, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the

December 9, 2020

issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Issued at Baltimore, Maryland this 9th day of December, 2020.

(SEAL)

/s/ *Sean R. Marshall*

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